

STATE OF MICHIGAN
COURT OF APPEALS

EUGENE HOUSTON,

Plaintiff-Appellee,

v

CITY OF DETROIT DEPARTMENT OF
TRANSPORTATION and ERVING COLLIER,
JR.,

Defendants,

and

SMART CORPORATION and ETHEL
CAMPBELL,

Defendants-Appellants.

EUGENE HOUSTON,

Plaintiff-Appellee,

v

CITY OF DETROIT DEPARTMENT OF
TRANSPORTATION,

Defendant-Appellant,

and

SMART CORPORATION, ETHEL CAMPBELL,
and ERVING COLLIER, JR.,

Defendants.

UNPUBLISHED

April 4, 2006

No. 262627

Wayne Circuit Court

LC No. 04-405366 – NI

No. 262693

Wayne Circuit Court

LC No. 04-405366 – NI

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

In this consolidated appeal, defendants SMART and Campbell appeal by leave granted the circuit court's order denying their motion for summary disposition, which had been brought based on plaintiff's failure to provide timely notice of his claim for personal injury. Defendants SMART, Campbell and the City of Detroit – Department of Transportation ("City of Detroit") appeal by leave granted the circuit court's order denying their motions for summary disposition, which were based on plaintiff's failure to suffer a serious impairment of body function. We affirm in part and reverse in part and remand.

I. FACTS

On February 1, 2002, a SMART bus and a City of Detroit bus ("D-DOT bus") were involved in an accident. The only damage done to either bus was a damaged side mirror to the D-DOT bus. Plaintiff, a passenger in the D-DOT bus, alleges that the injuries he suffered in the accident—a herniated disc and radiculopathy—constitute a serious impairment of body function. Plaintiff went to the emergency room at Henry Ford Hospital (Henry Ford CC) on February 9, 2002, approximately eight days after the accident due to pain and stiffness in his neck and lower back upon waking up in the morning. This was plaintiff's only trip to an emergency room for his injuries sustained in the accident.

In January 2001, plaintiff began attending Henry Ford CC and received a work study job as a "campus mailman," where he made \$5.15 per hour. His job involved a lot of heavy lifting and walking. Plaintiff did not own a car, nor did he have a driver's license. Instead, plaintiff rode his bicycle eight miles from his home to get to Henry Ford CC. Plaintiff continued to ride his bike to Henry Ford CC for approximately six months after the accident. But after six months, plaintiff began taking the bus due to the pain he experienced while riding his bike. Plaintiff no longer rides a bike.

In May 2003, plaintiff quit attending Henry Ford CC. Plaintiff had difficulty concentrating in class because his sitting on the hard, wooden chairs would cause pain in his back. Before the accident, plaintiff had no problems sleeping. However, plaintiff testified that due to his injuries he could no longer work or ride his bike as before the accident. Further, plaintiff periodically woke up in the middle of the night with pain and did not get eight hours of uninterrupted sleep since the accident.

On February 15, 2002, plaintiff saw a chiropractor, Dr. Michael S. Meeron, after continuing to experience pain and stiffness in his neck and back. Dr. Meeron believed that plaintiff sustained a herniated disc and advised plaintiff to abstain from occupational duties that required any lifting, bending, prolonged standing or walking. Plaintiff received treatment from Dr. Meeron from approximately February 2002 until June 2004, and Dr. Meeron recommended that the plaintiff see an additional doctor, who advised the plaintiff to obtain an MRI of his spine to rule out a herniated disc as the source of plaintiff's pain. An MRI of plaintiff's back revealed a herniated disc. In March 2004, after the MRI, Dr. Meeron sent plaintiff to see a neurosurgeon, Dr. Miguel Lis-Planells, who concluded that the bus accident caused the plaintiff's back problems and that his condition would likely worsen without surgery.

At the request of the City of Detroit, Dr. Peter LeWitt examined the plaintiff on April 17, 2003 and found no significant injury consistent with lumbar disc disease or other significant pathology leading to disability. Dr. LeWitt concluded that the normal examination is compatible with an old injury from which the plaintiff had previously recovered. Dr. LeWitt further concluded that the discomforts described by the plaintiff were not disabling from the history provided or on examination.

At the request of SMART, plaintiff was examined by Dr. Scott T. Munson, on October 26, 2004. Dr. Munson questioned whether the plaintiff's herniated disc occurred as a result of the bus accident. However, based on the MRI evidence of a herniated disc, Dr. Munson recommended that the plaintiff should avoid heavy lifting or repetitive bending, but concluded that the plaintiff could otherwise return to work and perform normal daily activities otherwise.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and documentary evidence presented, viewed in the light most favorable to the non-moving party, show that there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In addition, this Court reviews questions of statutory interpretation *de novo*. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

III. NOTICE

A. 60 Day Provision of MCL 124.419

First, SMART and Campbell argue that the trial court erred in denying their motion for summary disposition which was based on plaintiff's failure to provide timely notice of his claim for personal injury. MCL 124.419 states in pertinent part the following:

All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, that written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained.

The accident between the D-DOT bus and the SMART bus occurred on February 1, 2002. However, plaintiff did not provide SMART with notice of his claim for personal injury until April 2003, well over a year after the accident. Nonetheless, the trial court held that plaintiff complied with MCL 124.419 because he provided notice within 60 days after learning that a SMART bus was involved in the accident.

MCL 124.419 clearly states that notice of a claim for personal injury must be provided to a transportation authority "no later than 60 days *from the occurrence* through which the injury is sustained" (emphasis added). The plain language of MCL 124.419 is clear and unambiguous: notice of a claim for personal injury must be given within 60 days of the occurrence causing the

injury. Neither plaintiff nor the trial court cited any authority for the proposition that the 60-day notice provision runs from the date a plaintiff discovers a defendant's involvement in the occurrence. The plain language of MCL 124.419 required plaintiff to provide notice of his claim for personal injury to SMART within 60 days after the accident.

This Court has previously held that the 60-day notice provision in MCL 124.419 does not apply to claims for first-party PIP benefits against a transportation authority, but that it does apply to third-party claims for personal injury. *Trent v Smart*, 252 Mich App 247, 251; 651 NW2d 171, 2002. Therefore, this Court holds that the trial court erred in concluding that plaintiff complied with 60 day notice provision in MCL 124.419

B. Actual Prejudice

Plaintiff's failure to comply with the 60-day notice provision is only fatal, however, if SMART and Campbell have suffered actual prejudice from plaintiff's failure to provide timely notice. *Trent, supra* at 253. "Prejudice refers to 'a matter which would prevent a party from having a fair trial, or matter which he could not properly contest.'" *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997) (citations omitted). SMART and Campbell assert they cannot contest that Campbell was not at fault for the accident because they were unable to identify or locate any witnesses who could clearly remember the accident. The trial court did not address whether SMART and Campbell suffered actual prejudice because it held that plaintiff complied with the 60 day notice provision. Therefore, we remand for the trial court to consider whether SMART and Campbell have suffered actual prejudice.

IV. SERIOUS IMPAIRMENT OF BODILY FUNCTION

Second, the City of Detroit, SMART, and Campbell argue the trial court erred in denying their motions for summary disposition which were based on plaintiff's failure to suffer a serious impairment of body function. We disagree.

Under the no-fault act, an injured person may recover for noneconomic loss "only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). In determining whether a plaintiff has suffered a serious impairment of body function, a court must "engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." *Kreiner v Fischer*, 471 Mich 109, 132-133; 683 NW2d 611 (2004). A court must then engage in an objective analysis to determine whether the difference between the plaintiff's pre-and post-accident lifestyle has affected the plaintiff's "general ability" to lead the course of his life. *Id.* at 133. Courts must proceed on a case-by-case basis in determining whether a plaintiff has suffered a serious impairment of body function because the no-fault act requires inherently fact-specific determinations. *Id.* at 134 n 19.

Initially we note that based on the doctors' opinions there is a factual dispute as to whether plaintiff's injuries were actually caused by the bus accident. Dr. Munson, who examined plaintiff on behalf of the SMART, questioned whether plaintiff's herniated disc was a

result of the accident. Moreover, Dr. LeWitt, who examined plaintiff on behalf of the City of Detroit, concluded that plaintiff's condition was compatible with a former injury. Although plaintiff did not visit the emergency room until nine days after the bus accident, the emergency room doctor diagnosed plaintiff with a hip contusion and neck spasms and recommended that plaintiff visit a chiropractor should plaintiff's pain continue.

The following is the evidence presented by plaintiff to the trial court in regard to his injuries, which we believe created a genuine issue of material fact as to whether plaintiff suffered an objectively manifested impairment that affects plaintiff's general ability to lead his normal life. As to the injury itself, plaintiff went to the emergency room at Henry Ford Hospital on February 9, 2002 (approximately eight days after the accident), because he was experiencing some "crooks" in his neck when he would wake up in the morning and because his lower back was just real stiff and it was hurting. He was treated at the Henry Ford ER by Dr. Susan Coleman, who diagnosed plaintiff with a hip contusion and a "spasm of lumbosacral neck area." Dr. Coleman gave plaintiff a small dose of Motrin and a prescription for Zantac and told plaintiff that if his pain got worse, he should see a chiropractor.

On February 15, 2002, plaintiff went to see a chiropractor, Dr. Michael S. Meeron, because he continued to experience pain and stiffness in his neck and back. Dr. Meeron diagnosed plaintiff with the following:

1. Severe and chronic cervical sprain with myositis.
2. Severe and chronic dorsal sprain.
3. Severe and chronic lumbar sprain with myositis and right side radiculitis.
4. Chronic instability of the cervical, dorsal and lumbar spine.

Dr. Meeron believed that plaintiff had sustained a herniated disc and he had advised plaintiff "to abstain from any physical or occupational duties that require any lifting, bending, stooping, twisting, prolonged standing or walking." Plaintiff received treatment from Dr. Meeron from approximately February 2002 until June 2004. The treatment included shock treatment, heat packs, and massages.

Dr. Meeron recommended to plaintiff that he see Dr. William Gonte. After his initial examination of plaintiff, Dr. Gonte stated it was "imperative" that plaintiff obtain an MRI of his spine to rule out "disc herniations and possible cord compression" as the source of plaintiff's pain. On January 3, 2004, Dr. Harvey Wilner performed an MRI on plaintiff's back. The MRI revealed that "[t]here is a large right paracentral herniation [at L5/S1] with an inferior extrusion, pressure on the right side of the subarachnoid space, the right nerve root and the right epidural space." On February 5, 2004, Dr. Haranath Policherla performed an EMG on plaintiff's back that revealed a "light LS-51 radiculopathy."

After the MRI and EMG, Dr. Meeron sent plaintiff to see Dr. Miguel Lis-Planells, a neurosurgeon, in March 2004. In Dr. Lis-Planells's opinion, plaintiff "was suffering from a right S-1 radiculopathy secondary to a large L-5/S-1 herniated disc." According to Dr. Lis-Planells, "[i]t is clearly apparent that the incident which precipitated the onset of these problems was the bus accident." Dr. Lis-Planells recommended surgery because "there is a reasonable likelihood that [plaintiff's] condition [without surgery] will not only not improve but may certainly worsen." Finally, Dr. Lis-Planells stated that in his professional opinion, plaintiff "should not expose himself to any type of any lifting in excess of five (5) pounds or any repetitive and active

bending and twisting as these restrictions would be necessary simply to reduce the symptomatology which was exhibited at the time of my examination.”

This evidence, if believed, creates a triable issue of fact as to whether plaintiff suffered a objectively manifested impairment of an important bodily function. The next question is whether plaintiff created a genuine issue of material fact on whether the impairment affected his general ability to lead his normal life. Though a close question, we believe he did.

In deciding this issue, we must consider the plaintiff’s pre-and post-accident lifestyle. *Kreiner, supra*. Before the accident, plaintiff worked a mail position at a community college, a job which paid for plaintiff’s attendance at the college. Plaintiff’s sole means of transportation was a bike, or riding the bus. Plaintiff testified that his injuries have prevented him from continuing his college education and working as a campus mailman, which involved heavy lifting. Without that job, he could no longer pay for the schooling. Plaintiff further testified that he quit riding a bike based on the amount of pain he was experiencing. And, although self-imposed restrictions based on real or perceived pain are insufficient to establish a residual impairment, *Kreiner, supra* at 133 n 17, plaintiff’s doctors recommended that he not engage in activities that involve heavy lifting, repetitive bending, or prolonged walking. These restrictions affected his ability to lead his normal life.¹

Affirmed in part and reversed in part. We affirm the denial of the defendants’ motion for summary disposition on the issue of serious impairment of body function and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

¹ Plaintiff also testified to a decreased ability to sleep, to engage in sexual relations.